

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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March 3, 2006

In the Matter of
John Kimball

Docket No. 2005-243
File No. 259-658
Pepperrell

RECOMMENDED FINAL DECISION

This is an appeal of a denial of a Superseding Order of Conditions issued from the Department's Central Regional Office affirming an Order of Conditions also denying the proposed project issued by the Pepperrell Conservation Commission.

On December 6, 2005, I issued an Order to File a More Definite Statement to the applicant/petitioner requiring him to file a copy of the document being appealed. On December 15, 2005, I received a copy of the appealed document along with a copy of the Order of Conditions issued by the Pepperrell Conservation Commission. The proposed project is a new driveway with associated utilities to serve an existing dwelling at 23 Heald Street. Page 6 of the Conservation Commission's Order of Conditions notes that the project also required approval under Pepperrell's Wetland Protection By-Law, and that the project could not be conditioned to meet the standards of section 2.g of the By-Law. Condition G of the Order of Conditions states "...the Commission finds that the proposed project, for the various reasons listed above does not



meet the Resource Protection Setback provisions of the By-Law to the greatest extent possible, as required in 2g.”

The rules for adjudicatory proceedings at 310 CMR 1.01(5)(a)2 allow for dismissal of claims for mootness “where the record discloses that the proposed project, [or] activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.”¹ If the applicant has not yet obtained a required final decision, the administrative appeal before the Department may be stayed pursuant to 310 CMR 1.01(5)(a)3 (when “the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department’s administrative resources, or for other good cause.”) In the case of a pending appeal of a local wetlands by-law denial in Superior Court, 310 CMR 1.01(6)(h) requires that an administrative appeal of the Department’s SOC be stayed.

On December 22, 2005 I issued another Order to the applicant/petitioner to determine whether the project’s denial by the Pepperell Conservation Commission under the By-Law was final. The Order required the applicant/petitioner to file a statement by January 4, 2005 indicating whether he had filed an appeal in the Superior Court contesting the Commission’s By-Law denial. The Order gave notice to the applicant that if no appeal had been filed, his claim here could be dismissed as moot as another more stringent denial would be final, a circumstance preventing the project as proposed from going forward. If however, an appeal of the By-Law denial was pending, the Order notified the parties that this administrative appeal would be stayed pursuant to 310 CMR 1.01(6)(h) and 310 CMR 1.01(5)(a)3.

¹ This rule at 310 CMR 1.01(5)(a)2 (effective January 1, 2005) embodies a long standing policy of the Department concerning project denials based on more stringent local wetlands by-laws. Policy DWW Appeal Stay Policy 89-1 states, “If the denial under the bylaw is not appealed within the appropriate time frame that denial is final. No work can take place under such a denial.”

The applicant/petitioner's response to the Order reported that no appeal of the By-Law denial had been filed in the Superior Court and explained his view that the Bylaw referenced in the Order does not apply to the project and/or lot at issue because it is a lot that precedes the adoption of the Bylaw and is exempt from that provision. He further states, that the Commission's consideration of "the affected areas under the instant proposal with the affected distant area that was the subject of the 1995 filing" would not "arise" under the local By-Law and should instead be considered in this proceeding reviewing the Department's SOC.

On January 11, 2006, this office received a letter with a copy of the Pepperrell Wetlands Protection By-Law attached from Ellen Fisher, Conservation Administrator, for the Pepperrell Conservation Commission in response to the applicant/petitioner's submittal. In her letter, Ms. Fisher disagrees with the applicant's contention that the Pepperrell Wetlands By-Law does not apply to the project. Ms. Fisher refers to page 1 of the Order that indicates issuance under the WPA and the Pepperrell Wetlands Protection By-Law. In Section D of the Order, section 2g of the By-Law is cited as the standard under which the proposed work cannot be conditioned, and Finding G in the Order restates the Commission's determination that the provisions of the By-Law, section 2g, had not been met.² She further states that fees were paid under both the WPA and the Pepperrell Wetlands Protection By-Law. The Department did not file any response.

After reviewing the denials of the OOC and the SOC along with the letter from the Pepperrell Conservation Commission, I recommend this appeal be dismissed as moot, in accordance with 310 CMR 1.01(5)(a)2. Although the applicant evidently does not agree with the Commission's view of the applicability of the By-Law to this lot, or the appropriateness of considering the adjoining lots in reviewing the proposed project under the By-Law, the only

² The Order of Conditions also indicates the denial is based on lack of sufficient information necessary to condition the project. Order of Conditions, page 2, and attachment thereto, condition F. The Department adopted this rationale as well in affirming the Commission's Order of Conditions.

avenue for challenging the Commission's action under the By-Law is in Superior Court. Left unchallenged, the decision of the Conservation Commission denying the project under the By-Law has become final. Because the denial of the Pepperell Conservation Commission is final, the project cannot therefore be built as proposed, and I recommend dismissal of this appeal pursuant to 310 CMR 1.01(5)(a)2.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c.30A. The Commissioner's final decision is subject to rights and reconsideration and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., March 8, 2006.

